

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CARPENTERS HEALTH AND
WELFARE FUND OF
PHILADELPHIA, ET AL.,
PLAINTIFFS,

Civil Action

No. 06-3283

v.

NDK GENERAL CONTRACTORS,
INC.,

DEFENDANT.

March 29, 2007

MEMORANDUM/ORDER

Plaintiffs Carpenters Health and Welfare Fund of Philadelphia, *et al.*,¹ move the court for a default judgment against defendant NDK General Contractors, Inc. For the reasons given below, I will grant plaintiffs' motion in part and enter a default judgment

¹ The plaintiffs in this action are (a) Carpenters Health and Welfare Fund of Philadelphia and Vicinity, (b) Carpenters Pension and Annuity Fund of Philadelphia and Vicinity, (c) Carpenters Savings Fund of Philadelphia and Vicinity, (d) Carpenters Joint Apprenticeship Committee, (e) the National Apprenticeship and Health and Safety Fund, (f) Carpenters Political Action Committee, (g) Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, (h) Edward Coryell.

Plaintiffs (a)-(e) are "trust funds" within the meaning of 29 U.S.C. § 186 (Labor and Management Relations). Plaintiffs (a)-(e) also qualify as "multiemployer plans" and "employee benefit plans" under the definitions section of the Employee Retirement Income Security Act, 29 U.S.C § 1002. Coryell, plaintiff (h), is "a trustee and fiduciary" with respect to plaintiffs (a)-(d).

against defendant in the amount of \$28,707.19.

I. Facts

Defendant is a signatory to a collective bargaining agreement with the Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland (“Council of Carpenters”). Docket #6, Exhibit 2 at ¶ 8. Under the terms of this agreement, defendant is required to: (1) “make full and timely payments on a monthly basis” to several trust funds established for the benefit of defendant’s employees (“Funds”); (2) “file remittance reports . . . detailing all employees or work for which contributions were required”; (3) “produce, upon request by the Funds . . . all books and records deemed necessary to conduct an audit of [defendant’s] obligations to the Funds and [Council of Carpenters]”; (4) “pay liquidated damages and all costs of litigation, including attorney’s fees . . . due as a consequence of the [defendant’s] failure to comply with [the above-described] contractual obligations.” Docket #1 at ¶ 12.

On July 25, 2006, plaintiffs brought suit in this court, alleging that defendant had failed to make trust fund contributions as required under the collective bargaining agreement. On August 8, 2006, plaintiffs served defendant with a summons and complaint. Docket #3. On September 7, 2006, the clerk granted plaintiffs’ motion for entry of a default, defendant having not answered the summons or otherwise appeared in

the action.² Docket #5. Plaintiffs now seek an award of \$28,707.19, consisting of \$20,240.80 in unpaid trust fund contributions, \$1,693.53 in interest, \$2,204.08 in liquidated damages, \$100 in audit costs, and \$4,468.78 in attorney's fees and costs. Docket #6 at 5. Plaintiffs also move the court for an order compelling defendant to produce "payroll books and related records for any period after January 31, 2006 so that a precise determination of any future amount owed can be made." *Id.* at 9.

II. Discussion

Plaintiffs bring their motion under Federal Rule of Civil Procedure 55(b)(2) and the Employee Retirement Income Security Act (ERISA).

A. Default Judgment

Federal Rule of Civil Procedure 55(b)(2) authorizes a court to enter a default judgment in cases where the defendant is not "an infant or incompetent person." In *Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000), the Third Circuit observed that, when entertaining a motion for judgment by default, a district court should consider the existence of "prejudice to the plaintiff if default is denied," as well as "whether the defendant appears to have a litigable defense."

Under ERISA, benefit plans are required to pay benefits and pension credits to

² Fed. R. Civ. P. 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

vested participants regardless of whether employers have “live[d] up to their obligations” of contribution. *Benson v. Brower’s Moving & Storage, Inc.*, 907 F.2d 310, 314 (2d Cir. 1990)); *see also* 29 C.F.R. § 2530.200b-2(a) (“a payment shall be deemed to be made by . . . an employer regardless of whether such payment is made by . . . the employer”). Thus, even if defendant does not make the required contributions, the trust fund plaintiffs will still be held accountable for paying vested participants. The first factor set out by the Third Circuit—prejudice to plaintiffs if a default judgment is not granted—is therefore met. Defendant has filed no responsive pleading and the record before the court does not reveal any “litigable defense.” The court must therefore presume that defendant has none. Accordingly, I will enter a default judgment for plaintiffs and against defendant.

B. Award Requested

(1) Propriety of the Requested Award

Plaintiffs move this court for an award of unpaid trust fund contributions, interest on these unpaid contributions, liquidated damages, audit costs, and attorney’s fees and costs. ERISA § 515, 29 U.S.C. § 1145, provides that “[e]very employer who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.” ERISA § 502(g)(2) provides that:

[i]n any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court *shall* award the plan--

- (A) the unpaid contributions,
- (B) interest on the unpaid contributions,
- (C) an amount equal to the greater of--
 - (i) interest on the unpaid contributions, or
 - (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent . . .
- (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
- (E) such other legal or equitable relief as the court deems appropriate.

29 U.S.C. § 1132(g)(2) (awards in actions involving delinquent contributions) (emphasis added).

Defendant is subject to the requirements of ERISA § 515 by virtue of its collective bargaining agreement with the Council of Carpenters. The plaintiffs in this action include “a trustee and fiduciary” of the trust funds to which defendant is obligated to contribute, employee representatives, and the trust funds themselves. *See supra* note 1. Thus, in accordance with ERISA § 502(g)(2), the court will entertain plaintiffs’ request.

(2) Amount to be Allowed

(a) Unpaid contributions, audit costs, and attorney’s fees

Plaintiffs move this court to award \$20,240.80 in unpaid contributions, \$100 in audit costs, and \$4,468.78 in attorney’s fees and costs. Joseph Obuschowicz, the collections manager for the trust funds, has attested that plaintiffs have incurred \$100 in audit expenses, and that defendant owes \$20,240.80 in unpaid contributions for the period

January 2005 to January 2006. Obuschowicz Decl., Docket #6, Exhibit 1 at ¶ 9. Jessica Tortella, the plaintiffs' attorney, has submitted billing summaries verifying that plaintiffs have incurred \$3,3048 in attorney's fees for 12.3 hours of Ms. Tortella's work, billed at \$220 per hour; and 3.6 hours of work by Catherine T. Morgan, a paralegal whose hourly rate is \$95 per hour. Tortella Decl., Docket #6, Exhibit 4. Ms. Tortella has also attested that plaintiffs have incurred \$848.78 in research and photocopying costs. *Id.* The rates, hours, and costs attested to by Ms. Tortella, which come to a total of \$4,468.78, appear reasonable. I will therefore award plaintiffs \$20,240.80 in unpaid contributions, \$100 in audit costs, and \$4,468.78 in attorney's fees and costs.

(b) Interest and Liquidated Damages

Plaintiffs also move this court to award \$1,693.53 in interest and \$2,204.08 in liquidated damages. As discussed above, ERISA § 502(g)(2) provides that, in any successful action under that sub-chapter, the court "shall award" the interest owed on the unpaid contributions plus "the greater of" either this interest or "liquidated damages provided for under the plan."

Because the collective bargaining agreement does not specify an interest rate, Obuschowicz Decl. at ¶ 10, the interest owing to the trust funds must be calculated at the rate authorized by ERISA § 502(g)(2), which, in turn, references 26 U.S.C. § 6621. Under § 6621, the applicable interest rate is calculated by rounding the federal short-term rate established by the Internal Revenue Service to the nearest full percent and then

adding three percentage points. Calculating the interest owed according to the applicable interest rate yields the amount of \$1,693.53 for interest owing.³ Docket #6, Exhibit 3.

Mr. Obuschowicz has attested that the bargaining agreement provides for liquidated damages to be assessed at “ten percent (10%) of the contributions received . . . later than the twenty-fifth (25th) day following the end of each calendar month.” Obuschowicz Decl. at ¶ 9. Defendants have made no contributions to the trust funds during the period from January 2005 to January 2006. The unpaid contributions from this period amount to \$20,240.80—ten percent of which comes to \$2,204.08.

In accordance with ERISA § 502(g)(2), I will therefore award plaintiffs \$1,693.53 in interest and \$2,204.08 in liquidated damages.

C. Request for Injunctive Relief

In addition to requesting relief under ERISA § 502(g)(2), plaintiffs also move the court for an order compelling defendant to produce its “payroll books and related records” so that plaintiffs can determine if defendants owe any contributions for the period after January of 2006. Docket #6 at 9. As the Third Circuit has noted on

³ Federal short-term interest rates were 2.25 for the period from January to March 2005, 2.75 for the period from April to September 2005, 3.75 for the period from October 2005 to June 2006, 5 for the period from July to October 2006. Rounding to the nearest full percent and then up by three percentage points as required by § 6621, generates the following applicable interest rates: 5% for the period from January to March 2005, 6% for the period from April to September 2005, 7% for the period from October 2005 to June 2006, and 8% for the period from July to October 2006.

several occasions, “the grant of injunctive relief is an extraordinary remedy * * * which should be granted only in limited circumstances.” *American Tel. & Tel. Co. v. Winback and Conserve Program*, 42 F.3d 1421, 1426-7 (3d Cir. 1994) (quoting *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988)). Neither plaintiffs’ motion nor plaintiffs’ complaint alleges any facts suggesting the necessity of injunctive relief. Accordingly, it seems premature to entertain plaintiffs’ request at the present time.

Conclusion

And now, upon consideration of plaintiffs’ Motion for Judgment by Default it is hereby **ORDERED** that:

(1) Default judgment is entered in favor of plaintiffs in the amount of \$28,707.19, consisting of \$20,240.80 in unpaid contributions, \$1,693.53 in interest, \$2,204.08 in liquidated damages, \$100 in audit costs, and \$4,468.78 in attorney’s fees and costs;

(2) The remainder of plaintiffs’ motion, as it relates to plaintiffs’ request for injunctive relief, is **DENIED** without prejudice to resubmission of an appropriate motion.

BY THE COURT:

/s/ Louis H. Pollak
Pollak, J.